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No. 86-1261

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SEQUOIA BOOKS, INC.,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General of Illinois
ROMA J. STEWART
Solicitor General of Illinois
MARK L. ROTERT
Assistant Attorney General
JACK DONATELLI *
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570

Counsel for Respondent

* Counsel of Record

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PRAYER

Respondent asks this Court to deny the petition for writ of certiorari to review the judgments and orders of the Illinois Appellate Court, Second District, entered July 9, 1986, and August 11, 1986, affirming petitioner's convictions for obscenity because the petitioner does not present a question that is worthy of review by this Court.

OPINIONS BELOW

The opinions of the Illinois Appellate Court, Second District, which petitioner asks this Court to review are reported as *People v. Sequoia Books*, 145 Ill.App.3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986) and *People v. Sequoia Books*, 146 Ill.App.3d 1, 496 N.E.2d 740 (2nd Dist. 1986) and are contained in the appendix to the petition as exhibits A and B.

JURISDICTION

The petition sets forth the jurisdictional requisites. But as the following argument demonstrates, petitioner has not provided this Court any reason why it should exercise its discretion to grant a writ of certiorari.

STATEMENT OF THE CASE

The petition provides an accurate statement of what this case is about. Respondent's ensuing argument will rely on the facts contained in that argument, as well as facts provided in the appellate court opinions and the record.

REASONS FOR DENYING THE PETITION

THE PETITIONER HAS NOT PRESENTED A QUESTION WORTHY OF REVIEW BY THIS COURT.

A. The Circumstances Surrounding The Search Warrant Do Not Warrant Intervention By This Court.

Petitioner seeks review of the opinion and order rendered on July 9, 1986, for several reasons, each relating to the issuance of the search warrant: 1) that the particular search warrant issued in this cause was invalid as too general, 2) that it was improperly issued since in this cause there was no searching focus conducted by the magistrate on the question of the obscenity of the sought-after magazines, and 3) that the particular seizure conducted in this cause amounted to a prior restraint.

These are not issues which require the voice of this Court, either for further explanation of law or to resolve any conflict on points of law between the state court opinion and opinions of this Court or those from other jurisdictions. Indeed, this Court just fully addressed these warrant concerns—the obligation of the magistrate to focus searchingly on the question of obscenity before issuing a warrant, the obligation to issue a warrant of sufficient specificity, and the obligation to ensure that a search will not amount to prior restraint—just last year in *New York v. P.J. Video, Inc.*, ____ U.S. ____, 106 S.Ct. 1610 (1986).

In *P.J. Video*, this Court explained that the warrant requirement involving seizure of materials presumptively protected by the First Amendment is a little different from those which do not implicate the First Amendment. The trial courts must make sure that certain special conditions have been met by police. For instance, in all cases,

a magistrate may not issue a warrant authorizing seizure of such materials based on the conclusory allegations of a police officer that the sought-after materials are obscene. Rather he must make sure that the complaint for warrant is supported by affidavits setting forth specific facts in order that he may focus searchingly on the question of obscenity.

Furthermore, the courts may not allow the police to rely on the "exigency" exception under circumstances where this would constitute a "prior restraint." Whenever it is apparent that a large-scale seizure of materials would restrict public access to material and thereby amount to a "prior restraint," the court must first provide an adversary hearing on the question of obscenity before the search can take place. But it is a defendant's burden to make a pretrial showing of a "substantial" prior restraint requiring a precedent adversary proceeding. Without such a showing made by defendant, there is no obligation to conduct a pretrial adversary hearing on the question of obscenity.

Aside from these special conditions, warrant applications in instances of a seizure of materials presumptively protected by the First Amendment are the same as those generally. For instance, the magistrate must apply the same standard of probable cause that he uses in other areas of fourth amendment law. This standard was most recently set out in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) and iterated in *P.J. Video*: probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. *P.J. Video*, 106 S.Ct. at 1616. Any claim of prior restraint has no relevance to the standard of probable cause for the issuance of a warrant to seize the materials—it only means that the police may not rely

on the "exigency" exception but must properly obtain a warrant from a magistrate. *P.J. Video*, 106 S.Ct. at 1615, n.6.

Clearly, petitioner's allegations raise concerns already dealt with last year in *P.J. Video*. Review in this cause would not contribute to the development of that area of law in any new or significant way. It could only rehash the *P.J. Video* principles. Thus, it is clear that the petition does no more than seek intervention by this Court to correct alleged errors in this cause alone.

But this record does not demonstrate the errors he alleges. First, the search warrant was issued after a searching focus conducted by the magistrate on the question of the obscenity. The appellate court in Illinois explained that the issuing magistrate had looked at the complaint for search warrant requesting authority to search the bookstore for magazines which contained depictions for cunnilingus, fellatio, anal intercourse, excretion of semen from the penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, and insertion of tongue into the anus. The magistrate looked at the supporting affidavit of Investigator Robert Wunsch, stating that he was in the bookstore, purchased two magazines depicting the explicit acts listed in the complaint, viewed three other magazines which also contained some of these same depictions, and that these magazines were offered for sale to the public. The magistrate was given and looked at the two magazines purchased by Investigator Wunsch for his own examination. And the magistrate looked at the supporting affidavit of Deputy McCann, stating the numerous criminal obscenity charges were pending against various persons as a result of the purchase of materials from the bookstore.

The appellate court concluded that the issuing magistrate had sufficient information to determine that the materials depicting the acts listed in the magazines and exhibited in the two magazines were patently offensive, would probably, as a whole, appeal to prurient interest based on community standards, and would probably be without redeeming social value. In reaching this conclusion, the appellate court relied on *P.J. Video* where this Court upheld the issuance of search warrants on the basis of similar affidavits detailing the character of certain films, including sexual depictions contained in the films, so that the judge could reasonably discern the prurient nature and value of the works even if he did not view the films for himself. *See also Sequoia Books v. McDonald*, 725 F.2d 1091 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 83 (magistrate who issued warrant for seizures from bookstore had probable cause to believe that the materials seized were pornographic where, though he did not have before him copies of any of those materials, he did have a detailed affidavit from a police investigator describing in minute detail nine magazines that the investigator had read in the store).

At bar, the issuing magistrate judge had even more to go on than did the magistrates in *P.J. Video* and *Sequoia Books v. McDonald*, because he had two magazines before him on which to make a judgment as to all three of the obscenity elements. With the affidavits and the magazines, the judge made his own searching focus as to the obscenity questions. And on this focus, he fashioned a warrant authorizing seizure of only materials containing specific explicit acts. Aware of the hard-core materials he himself reviewed and the nature of the bookstore which would sell such hard-core materials, he could be certain that there was virtually no chance that the officer, in executing

his warrant, could seize non-"prurient" materials with "value." Similarly, the Seventh Circuit in *Sequoia Books*, 725 F.2d at 1093, held that when a warrant confines officers to seizing materials containing sexually explicit depictions as described in the search warrant, such a warrant satisfies the requirement of particular description.

Finally, the issuing judge could also be sure there was no possibility of a prior restraint. Although the officers did seize a large number of books, the record shows that only a single copy of each magazine was seized, that the store was allowed to remain open and customers allowed to remain in the store, and the police even told employees that they were not there to close down the establishment. (3/22/84, R. 10, 29). Thus, the police seized some materials for evidentiary purposes only and never denied public access to them. Importantly, petitioner never met a pretrial burden showing substantial or even possible prior restraint. Without that showing, there was no basis on which the issuing judge could call for an adversary hearing on the question of obscenity before authorizing the search.

Therefore, review should be denied because petitioner has not presented any kind of novel or worthy issue nor shown an error that necessitates correction.

B. The Constitution Did Not Compel Admission Of Evidence Of The Adult Use Ordinances Offered By Petitioner.

Petitioner seeks review of the opinion and order rendered on August 11, 1986, claiming that he was entitled under the Constitution to use adult-use ordinances from five Illinois communities to help the jury determine contemporary community standards in Illinois. The premise of this argument is this evidence was necessary because Illinois jurors

have little experience on which to base an opinion of what the contemporary community standard is and need educating. (Petition, p. 18).

But petitioner's premise is flawed. The whole point of the standard of the contemporary community is that a juror does have his own understanding of the community in which he lives and his own knowledge of the propensities of the average person in his community, so that this determination is not dependent on expert evidence. *Hamling v. United States*, 418 U.S. 87, 104-105 (1974); *Smith v. United States*, 431 U.S. 291, 302 (1977). Thus, jurors can assess the standard of the community either without any evidence whatsoever or with evidence of the standard if it can assist them in the resolution. *Hamling*, 418 U.S. at 105-106. A trial court retains wide discretion in its determination to admit and exclude evidence. *Hamling*, 418 U.S. at 108.

In *Smith*, the federal court jury sitting in Iowa had received evidence that the State of Iowa left unregulated the distribution of obscene materials to adults and banned dissemination only to minors. This Court held that the State's obscenity statute was relevant evidence of the mores of the community whose legislative body enacted the statute. Although petitioner relies on *Smith* as applicable at bar, *Smith* never said that zoning ordinances were also relevant evidence of the mores of the community.

Indeed, the state court at bar has already held that the municipal ordinances are *not* relevant to the state standard of the community. The adult-use ordinances sought to be used by petitioner, involving the Illinois municipalities of Springfield, Quincy, Bloomington, Peoria, and Urbana, regulated zoning and employee permits for adult theaters, bookstores, and nightclubs. Petitioner suggested at trial

that they revealed a degree of public acceptance of sexually explicit material in Illinois.

But the Illinois courts disagreed because these ordinances were not limited to patently obscene materials or sexually explicit materials having no social value. Nor did any of these municipalities adopt them as an acknowledgement of the public acceptance of materials deemed obscene. Rather they arose from the municipalities' obligation to address the zoning problems that adult bookstores raise, regardless of whether these bookstores carry materials ultimately adjudged to be obscene. Where the ordinances are for the limited purpose of zoning, and purport no reflection on the public's acceptance of obscene materials, the state court concluded there was no error in refusing to admit them for having no bearing on an Illinois community standard.

Therefore, this claim is not worthy of review on the law or on the facts. The law is already well-settled that no evidence at all is needed for the jury to determine the standard of the community but that such evidence can be used if relevant in a given case. And the facts of this case show that the evidence of zoning ordinances in five Illinois metropolises was not relevant to the question of how an average person in Illinois would assess the three obscenity prongs of prurience, offensiveness, and value. Review on this calim must be denied.

C. This Court Already Has Two Cases Pending Before It Which Present The Issue Whether Community Standards Apply To The Value Element Of The Tripartite Obscenity Test.

Petitioner explains that the constitutionality of the Illinois Obscenity Statute under which he was convicted is presently pending before this Court in *Pope v. Illinois,*

(No. 85-1973), *cert. granted*, 107 S.Ct. 61 (1986) which presents the same question presented now: the statute fails to limit application of contemporary community standards to the first two elements of the tripartite obscenity definition.

Since this issue is already before this Court, there is no need to review it again in this case. Respondent suggests that no action on this petition for writ of certiorari be taken until this Court has resolved the issue in *Pope* and this Court can proceed in this cause in accordance with *Pope*.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari because it presents no issue worthy of review by this Court.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General of Illinois

ROMA J. STEWART
Solicitor General of Illinois

MARK L. ROTERT
Assistant Attorney General

JACK DONATELLI *
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570

Counsel for Respondent

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* Counsel of Record